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U.S. DISTRICT COURT

NO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARCEL O. GOMEZ,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Civil No. 06-2411 H (JMA)

ORDER:

(1) DENYING IN FORMA PAUPERIS APPLICATION; and

(2) DISMISSING CASE WITHOUT PREJUDICE AND WITH LEAVE TO AMEND

Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (West 2006) together with a request to proceed in forma pauperis.

MOTION TO PROCEED IN FORMA PAUPERIS

Petitioner is not currently in custody and thus has not submitted a prison trust account statement in support of his motion to proceed in forma pauperis.¹ Petitioner has which reflects a \$767.79 balance in his bank account. (See Mot. to Proceed in Forma Pauperis at 2.) The filing fee associated with this type of action is \$5.00. See 28 U.S.C. § 1914(a). It appears Petitioner can pay the requisite filing fee. Accordingly, the Court **DENIES** the request to proceed in forma pauperis

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¹ Petitioner is currently on probation, and thus satisfies the custody requirement for petitions filed pursuant to 28 U.S.C. § 2254 (West 2006). See *United States v. Span*, 75 F.3d 1383, 1386 n.5 (9th Cir. 1996).

FAILURE TO NAME A PROPER RESPONDENT

Review of the Petition reveals that Petitioner has failed to name a proper respondent. On federal habeas, a state prisoner must name the state officer having custody of him as the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a habeas petition fails to name a proper respondent. *See id.*

“[T]he ‘state officer having custody’ may be ‘either the warden of the institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal institutions.’” *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a petitioner is in custody due to the state action he is challenging, ‘[t]he named respondent shall be the state officer who has official custody of the petitioner (for example, the warden of the prison).’” *Id.* (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note). However, if a “petitioner is on probation or parole, he may name his probation or parole officer ‘and the official in charge of the parole or probation agency, or the state correctional agency, as appropriate.’” *Id.* (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of] habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The actual person who is [the] custodian [of the petitioner] must be the respondent.” *Ashley v. Washington*, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of habeas corpus acts upon the custodian of the state prisoner, the person who will produce “the body” if directed to do so by the Court. Here, Petitioner has incorrectly named “People of the State of California,” as Respondent. In order for this Court to entertain a Petition for Writ of Habeas Corpus, Petitioner must name the person who will produce “the body” if directed to do so by the Court. Because Petitioner is on probation, the proper respondents is the Director of the agency who administers probation for the County of San Diego. *See Ortiz-Sandoval*, 81 F.3d at 894.

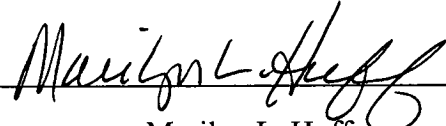
CONCLUSION

Accordingly, the Court **DISMISSES** the Petition without prejudice and with leave to amend. To have this case reopened, Petitioner must, **no later than January 12, 2007**: (1) pay the \$5.00 filing fee or submit adequate proof of his inability to pay the fee **AND** (2) file a First Amended Petition which

1 cures the pleading deficiencies outlined in this Order. **THE CLERK OF COURT IS DIRECTED TO**
2 **MAIL PETITIONER A BLANK MOTION TO PROCEED IN FORMA PAUPERIS AND A**
3 **BLANK FIRST AMENDED PETITION FORM.**

4 **IT IS SO ORDERED.**

5 DATED: 11/07/06



Marilyn L. Huff
United States District Judge